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No. 78-832

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM LORAIN EVANS, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for making a false and fraudulent statement on a withholding exemption certificate supplied to his employer, contending that the evidence was insufficient.

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of making a false and fraudulent statement on a withholding exemption certificate (Form W-4) submitted to his employer, in violation of 26 U.S.C. 7205. The court sentenced him to a one-year prison term. The court of appeals affirmed *per curiam* (Pet. App.).[1]

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[1]The judgment of the court of appeals was entered on June 13, 1978. A petition for rehearing was denied on July 27, 1978. The petition for a writ of certiorari was filed on October 10, 1978, and is therefore substantially out of time under Rule 22(2).

The evidence showed that during the period from July 1972 to October 1976 petitioner was an employee of Bell Helicopter Company (Tr. 24, 26). On June 30, 1972, petitioner filed a withholding exemption certificate with his employer and claimed two exemptions. Petitioner thereafter filed a second withholding exemption certificate on May 27, 1976. On this second form, petitioner crossed out the printed statement on the form indicating that the taxpayer's submissions were made under penalties of perjury and claimed 99 exemptions and allowances for withholding tax purposes. These 99 exemptions and allowances eliminated all withholding of any taxes from petitioner's wages (Tr. 32-33).

During the period in question, Bell Helicopter used its own withholding exemption form. Pursuant to its practice, Bell extracted the relevant information from the IRS Form W-4 and placed it on card stock paper for easier filing (Tr. 33). Unlike the IRS form, the Bell form did not contain any withholding tax tables or instructions on how to use them, nor did it contain any Privacy Act (5 U.S.C. 552a) information (Tr. 37-39). However, the Bell form contained all information necessary to compute withholding taxes (Tr. 43). The Bell Helicopter payroll department used the figure "99" as a computer code to signify that no taxes would be withheld from the wages of any employee who was exempt from taxation. Generally, such employees were those on overseas assignment. In such a case, the withholding exemption certificate of the overseas employee was not changed. Rather, the payroll department used the figure "99" in its computer records to indicate exempt withholding status (Tr. 40-41, 47-49, 150). During the period in question, petitioner never worked outside of the United States for Bell Helicopter (Tr. 25).

Petitioner's 1975 income tax return showed income taxes withheld of $2,741.60, and a claimed refund of $927.54, or an income tax liability of $1,814.06 (Tr. 94-95). He claimed four exemptions and $3,900 in itemized deductions (Tr. 132-133).

An employment tax specialist, qualified as an expert, testified for the government that, based on his 1975 return, petitioner was entitled to seven exemptions and allowances for withholding purposes in 1976. Petitioner's 1976 withholding deductions could not exceed those claimed for 1975, except for determinable itemized deductions (Tr. 132-134). The amount of itemized deductions needed to justify the 99 withholding exemptions and allowances claimed by petitioner totalled $72,913 (Tr. 113-116).

The chief accountant of Kirk Mayer Engineering Services, for which petitioner began work in October 1976, testified that petitioner filed a Form W-4E in which he stated that he incurred no tax liability in 1975 and anticipated no tax liability for 1976. As a result of petitioner's filing of this form, Kirk Mayer withheld no taxes from petitioner's salary (Tr. 52-55).

During the summer of 1976, John Wang, an employee of Bell Helicopter, received some literature from petitioner entitled "Tax Revolt—Conclusion" (Tr. 59-63). On page 4 of this pamphlet, the statement appeared that "The purpose of filing a W-4E, or 99 allowances, is to prevent withholding" (Tr. 63). At petitioner's invitation, Wang attended a tax protest meeting, at which petitioner was also present. Comments were made at the meeting that the income tax was used to support communism and abortions and that "not filing income tax" was a way to help America (Tr. 65-66).[2]

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[2]Wang subsequently claimed 99 withholding exemptions in order to prevent withholding. However, he filed a corrected form after talking with the investigating revenue agent (Tr. 65).

1. Petitioner contends (Pet. 6-9) that he could not be convicted under 26 U.S.C. 7205 because he submitted a withholding exemption certificate made by Bell Helicopter that was not identical to the official Internal Revenue Service Form W-4. He points to the fact that the Bell Helicopter form does not contain any information required by the Privacy Act of 1974 (5 U.S.C. 552a) or any withholding tables or instructions on how to use the tables.

Section 3402(f)(5) of the Internal Revenue Code of 1954 provides that "Withholding exemption certificates shall be in such form and contain such information as the Secretary or his delegate may by regulations prescribe." Section 31.3402(f)(5)-1 of the Treasury Regulations on Employment Taxes (1954 Code) (26 C.F.R.) states in part: "In lieu of the prescribed form, employers may prepare and use a form the provisions of which are identical with those of the prescribed form." Bell used their own form because the IRS form was incompatible with their filing system (Tr. 33, 151). Both forms require information as to the employee's name, home address, social security number, marital status, and the number of exemptions or allowances claimed, together with the jurat providing that the declarations of the form are made under the penalties of perjury.

The provisions that petitioner complains were absent from the Bell Helicopter form are not essential parts of the withholding form itself. Instead, they are merely instructions on how to complete the form, and notice to the employee of the authority under which the information is solicited, whether disclosure of the information is mandatory or voluntary, the purpose for which the information is to be used, the routine uses which may be made of the information, and the effects, if any, on the person requested to supply the information resulting from a failure to supply the information (5 U.S.C. 552a(e)(3)).

Thus, while it was not identical to the IRS form in every respect, the Bell form provides all of the information to enable the employer to withhold taxes properly. Since the pertinent provisions of the Bell form and the IRS form were identical, the Bell form complies with Section 3402(f)(5) and the Regulations. *United States* v. *Arlt*, 567 F. 2d 1295 (5th Cir., cert. denied, 436 U.S. 911 (1978).

2. Petitioner further contends (Pet. 8-11) that the evidence was insufficient to show that the Form W-4 he submitted to his employer was false and fraudulent. He argues that the number "99" was a computer symbol to indicate tax-exempt status and not a claim of 99 exemptions as charged, and that since the government offered no evidence to show that he incurred any tax liability for 1976, it did not refute his defense of exempt status for that year.

But the evidence showed that petitioner filed a claim of 99 exemptions and that he used this number to conform with Bell's practice to use the figure "99" to indicate exemption from withholding. Petitioner cannot invoke Bell's practice as an excuse for his own misconduct when the elimination of his withholding taxes was triggered by his own false statement.

To support a conviction, the government was only required to show that petitioner claimed more than the proper number of exemptions at the time he filed the withholding exemption certificate, so that the form he submitted was false and fraudulent. 26 U.S.C. 3402(f)(2)(B). There was ample evidence to support this conclusion. Petitioner's 1975 tax return showed that for that year he claimed four exemptions and $3,900 in itemized deductions. Expert testimony established that, based on his 1975 tax return, petitioner was entitled to a maximum of seven withholding exemptions, and that more than $72,000 in additional itemized deductions would have been necessary to claim 99 exemptions (Tr.

113-116, 132-134). From this evidence, the jury was entitled to find that petitioner could not reasonably have expected to have $72,000 in additional deductions and that he was not entitled to claim 99 exemptions.[3]

3. Finally, petitioner errs in contending (Pet. 10-11) that the evidence of willfulness was insufficient to support his conviction. The evidence established that petitioner signed a withholding exemption form which recited that he had incurred no tax liability for 1975, when, in fact, he had paid more than $1,800 in taxes. The evidence also showed that petitioner distributed "tax protester" literature urging the claiming of 99 exemptions to stop withholding and attended meetings at which such illegal acts were encouraged. This evidence was more than ample to show willfulness, which this Court has defined as a voluntary, intentional violation of a known legal duty. *United States* v. *Pomponio*, 429 U.S. 10, 11-13 (1976). See also *United States* v. *Moore*, 569 F. 2d 1312 (5th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

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[3]Petitioner contends (Pet. 9) that the government failed to show that form submitted was false and fraudulent because there was no proof that it suffered "damage" as a result of the deception. There is no such requirement. The government need only show that the taxpayer supplied false information with the intent to interfere with the withholding system and prevent the collection of taxes in the manner prescribed by law. See, *e.g.*, *United States* v. *Hinderman*, 528 F. 2d 100, 102 (8th Cir. 1976); *United States* v. *Smith*, 484 F. 2d 8, 10 (10th Cir. 1973), cert. denied, 415 U.S. 978 (1974). See also *United States* v. *Malinowski*, 472 F. 2d 850, 859 (3d Cir.), cert. denied, 411 U.S. 970 (1973).